

# Q&A

## CONSENT, CAPACITY AND LEGAL DECISION- MAKING



### Why are there laws about decision-making?

Everyone has to make certain important decisions, which could be about money, health care, housing, clothing and so on. Most decisions relate to two broad areas of decision-making: property decisions and personal care decisions.

### What are property decisions?

Property decisions have to do with finances – for example, how to spend or invest money; managing real property such as a house; applying for Ontario Disability Support Program (ODSP) benefits; or managing a Registered Disability Savings Plan (RDSP).

### What are personal care decisions?

Personal care decisions have to do with a person's health care, nutrition, housing, clothing, hygiene, and safety. For example, this may include consenting to a medical procedure or choosing where to live.

### What does it mean to be “capable”?

Generally, legal capacity is based on the ability to understand information relevant to making a decision and appreciating the consequences of a decision. The requirements for legal capacity differ depending on the type of decision being made.

### If someone does not trust my judgment, do they get to decide for me?

According to the law, there is a presumption of capacity. This means that it is presumed that all adults can decide for themselves unless there is evidence suggesting otherwise. A person is not incapable just because someone disagrees with their decision. Some decisions are more difficult than others. A person who may not be considered capable of making complex decisions could be capable of making simpler ones, perhaps with some support.

### What is substitute decision-making?

If there is evidence that someone might be incapable, then another person might need to make decisions instead. This person is called a substitute decision-maker (“SDM”).

### How do I appoint an SDM to make decisions on my behalf?

In Ontario, an SDM could be a guardian appointed by the court or an attorney named in Power of Attorney documents. If an incapable person has no other SDM, a government official called the Public Guardian and Trustee can make decisions instead.

### What is a guardian?

A guardian is a type of SDM that is usually appointed by a court. The guardian makes all the decisions for an individual and the individual loses all decision-making rights.

There are many concerns about guardianship. For instance, it may violate the legal human rights of the “incapable” person. In addition, the process of appointing a guardian is complex, expensive and time-consuming, so this solution should only be used as a last resort.



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### What is an attorney?

An attorney is someone who is named as an SDM in a power of attorney document – either a *Continuing Power of Attorney for Property* or a *Power of Attorney for Personal Care*. The law has a test about whether someone is capable of signing this document.

### What is a Continuing Power of Attorney for Property?

A Continuing Power of Attorney for Property is a legal document that allows a person to name an SDM to make decisions on their behalf about matters related to property. This may include real property, financial investments, bank accounts, etc.

### What is a Power of Attorney for Personal Care?

A Power of Attorney for Personal Care is a legal document that allows a person to name an SDM to make decisions on their behalf about matters related to health care, hygiene, nutrition, safety, shelter, and clothing.

### Do I have to have a guardian or attorney?

No, for some decisions, an SDM can act without being formally appointed. For instance, if an individual has ODSP income, then another person can apply to become their ODSP trustee and manage that money. A parent, spouse or common law partner can be the plan holder for an RDSP. A family member can also consent to medical treatment, admission to long-term care, and the collection, use or disclosure of personal health information. However, family members (even parents) do not have automatic rights to make all decisions for a person.

If an individual requires support when making decisions, it would be a good idea to talk to a lawyer with experience in this area before taking any steps that may impact their legal rights.

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